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March 31, 2004

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWB-204
Washington, DC 20554

Re: Ex parte, *BellSouth Request for Declaratory Ruling that State Commission May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Service to CLEC UNE Voice Customers*, WC Docket No. 03-251

Dear Ms. Dortch,

On Tuesday, March 30, 2004, Dina Mack and the undersigned, AT&T, and David Lawson, Sidley Austin Brown & Wood, representing AT&T, met with Michelle Carey, Brent Olson, Michael Engel, Ian Dillner, and Dennis Johnson of the Wireline Competition Bureau's Competition Policy Division. At this meeting we discussed AT&T's written comments in the above-captioned proceeding. I have attached an outline summarizing AT&T's arguments as presented during our meeting.

Sincerely,

ATTACHMENT

cc: M. Carey
I. Dillner
M. Engel
D. Johnson
B. Olson

The states have ample authority to restrict BellSouth's anticompetitive marketing practices

- The state orders reflect a straightforward exercise of the states' power to regulate competition in local telephone services.
- Preventing BellSouth from discontinuing DSL service was, for this purpose, no different from an order prohibiting BellSouth from imposing any other charge, cost, or inconvenience on a customer that sought to switch its voice service from BellSouth to a competitor.
- Sections 251-252, and the federal telecommunications Act, clearly preserve the commissions' authority to foster local competition in this fashion.
- Even if the state commissions' power over local telephony were not sufficient, the commission orders are authorized by the states' power over the intrastate communications component of DSL service.
- BellSouth argues that the state commissions lack authority to regulate interstate services, but this observation is entirely incorrect as applied to the "jurisdictionally mixed" services at issue here. For such jurisdictionally mixed services, the state has power to regulate the entire service unless that regulation "negates the exercise by the FCC" of its lawful powers.
    - The Supreme Court and courts of appeals have squarely rejected BellSouth's argument that when a jurisdictionally mixed service has an interstate component, only the FCC can regulate in a manner that affects the interstate service.

The state PSCs' Orders are not preempted by the Triennial Review Order

- The Commission stated unequivocally in its brief defending the Triennial Review Order that it most certainly "did *not* preempt states from adding to the unbundling requirements that the FCC adopted." FCC TRO Br. at 19 (emphasis in original)

- The Commission stressed that states have quite broad discretion in this area, noting that "state interconnection and access regulations must 'substantially prevent' the implementation of the federal regime to be precluded and that 'merely an inconsistency' between a state regulation and a Commission regulation was *not* sufficient for Commission preemption. Triennial Review Order ¶ 192 n. 611 (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997), *rev'd in part on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

- None of the state commission determinations BellSouth challenges required it separately to unbundle the low-frequency portion of its loops.

- Consistent with the Triennial Review Order, CLECs in each of the states at issue here remain obligated to secure and pay for the *entire* loop.

- BellSouth acknowledges that the CLEC must lease (and pay for) the entire loop and that the state requirements apply to the "unbundled loop," not to any new state-law low-frequency sub-loop UNE.

- The Triennial Review Order did not purport to authorize incumbent LECs to turn off (or refuse to provide) DSL service to customers that switch to another local telephone provider. The Commission said nothing about the reasonableness or lawfulness of BellSouth's practices, much less the propriety of restrictions on those practices imposed by sovereign states, in the exercise of core police powers expressly preserved by the Communications Act.

There is no conflict between the BellSouth tariff's terms and the state commission orders

- BellSouth relies upon Section 28.2.1 of its FCC No. 1 Access Tariff, entitled "BellSouth ADSL Service, General," which states: "The designated end-user premises location must be served by an existing, in-service, Telephone Company provided exchange line facility."
- AT&T UNE-P voice customers in BellSouth's region *ARE* "served by an existing, in-service, Telephone Company provided exchange line facility."
- Any ambiguity -- particularly, ambiguity in a provision claimed by a common carrier to entitle it both to deny service to disfavored customers and to preempt state law -- must be construed against BellSouth.
- BellSouth's claim that Section 28.2.1 unambiguously entitles it to deny service to any customer that maintains its existing, in-service BellSouth exchange line facility, but chooses to obtain voice service over that facility from another carrier is particularly untenable in light of BellSouth's January 8, 2004 tariff revision.
- On January 8, 2004 BellSouth revised its tariff to add a new, specialized "Session Based DSL Service," and the new provisions relating to that service (Section 28.3.1) contain both the original requirement that "[t]he designated end-user premises location must be served by an existing, in-service Telephone Company provided exchange line facility" ***AND*** an additional requirement that the "in-service exchange line facility, as referred to in connection with BellSouth Session Based DSL service, *must be provided in connection with a BellSouth retail local exchange service*."
- If BellSouth wants to impose that *new* condition on its DSL offerings more generally, it must propose revisions to its tariff to do so, and, if BellSouth does so, the Commission should -- before it relies upon any such new condition broadly to preempt state law -- determine that it is just and reasonable.